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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 227

ALVIN R. DORAN, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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The Petitioner, Alvin R. Doran, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on June 4, 1953.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

The United States Court of Appeals affirmed the judgment of conviction on June 4, 1953, and on July 3, 1953, Chief Justice Vinson extended to August 1, 1953, the time for filing this Petition for Certiorari, application therefor having been made on July 2, 1953.

OPINIONS BELOW

The opinion of the Court of Appeals (Clark, Bazelon and Washington, Circuit Judges) is not yet officially reported. The District Court rendered no opinion.

QUESTIONS PRESENTED

1. Whether a conviction for a sex offense which depends for essential corroboration upon the "testimony" of a female child, whose competency as a witness the Trial Judge failed to pass upon but passed to the jury in violation of the common law of the District of Columbia, should be permitted by this Court to stand.

2. Whether, in any event, the "testimony" of a female child can be competent evidence to support a conviction in a sex offense case, where the female child stated, (a) that she did not know what it meant "to swear to tell the truth"; (b) that she did not know "what it means to tell the truth"; and (c) that she did not know "what happens to anybody who tells a story after they are sworn to tell the truth."

3. Whether, in determining the competency of a female child as a witness in a sex offense case, Rule 26 of the Federal Rules of Criminal Procedure permits a Trial Judge to apply lower standards and treat the subject of competency more lightly and casually than in other cases.

4. Whether the judgment below deprives Petitioner of his liberty without due process of law.

THE RULE OF CRIMINAL PROCEDURE INVOLVED

Rule 26 of the Federal Rules of Criminal Procedure provides as follows:

> "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an Act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

STATEMENT

The judgment sought to be reviewed affirmed a judgment convicting Petitioner of violating the "Indecent Acts on Children Statute" (22 D.C. Code 3501(a)). He was tried by a jury, convicted, and sentenced to imprisonment for from one to four years. Execution of the sentence was suspended, and Petitioner was placed on probation.

The Petitioner is a reputable citizen, 45 years of age. He has an unblemished record, except for the conviction below. Prior to the conviction he was a civilian employee of the Navy. Only two witnesses, children, "testified" against him with regard to the facts essential for conviction, Doris, 8, and Barbara, 10. While their "testimony" was shot through with inconsistencies, which in this Petition we do not discuss, Barbara's "testimony" was essential to the conviction as the only corroborative evidence. *See Benton* v. *U. S.* (App. D.C. 1951) 188 F(2d) 625; 3 *Wigmore on Evidence,* Sec. 924a, pages 459-460.

1. The Voir Dire of Barbara Before She Was Sworn

The entire voir dire on the basis of which Barbara was sworn, over the objection of Petitioner's counsel, was as follows:

"BARBARA KEENAN

was called to the witness stand and was examined as follows:

BY THE COURT:

Q. What is your name, Barbara?
A. Barbara.
Q. How old are you, Barbara?
A. Ten.
Q. Do you go to Sunday School?
A. No, sir; I go to church.
Q. You do go to church?
A. Yes, sir.
Q. You know about God, don't you?
A. Yes, sir.

Q. Do you know what it means to swear to tell the truth?

A. I don't?

Q. You don't?

A. No.

Q. You know what it means to tell the truth, don't you?

A. I don't.

Q. You don't know that?

A. No, sir.

Q. Do you know what it is to tell a story, something that is not the truth?

A. Yes.

Q. If you swear to tell the truth then you mustn't tell a story, you understand that?

A. Yes, sir.

Q. What do you think happens to anybody who tells a story after they are sworn to tell the truth?

A. I don't know.

Q. A lot of people don't know either, but what do you think? What would you think would happen to somebody that swore to tell the truth and didn't?

A. I don't know.

THE COURT: Go ahead and administer the oath. We just have to do the best we can. I think the jury heard her. They are the judges.

MR. MCMENAMIN: I would like to interpose an objection for the record, if I may.

THE COURT: All right.

Thereupon,

BARBARA LEE KEENAN

was called as a witness by the United States and, being first duly sworn, was examined and testified as follows:"

This examination of Barbara disclosed three things: (1) to use the language of *Beausoleil* v. *United States, infra,* that she was completely lacking in "a proper consciousness of false swearing," (2) that she did not know "what it means to tell the truth;" and (3) that she was lacking in the intelligence necessary to qualify her as a witness.

Her answers to the Trial Judge's questions as to whether

or not she knew what it meant to swear to tell the truth and what it meant to tell the truth were clear and specific. She not only answered, "I don't" to both questions, but when the Trial Judge said, "You don't?" and, "You don't know that?" in response to her answers, she reiterated, with a clear finality, her lack of knowledge or understanding of those concepts.

She was then asked two further questions, "Do you know what it is to tell a story, something that is not the truth?" and, "If you swear to tell the truth, then you mustn't tell a story, you understand that?". These were apparently efforts by the Judge to instruct the child. But because of the use of the word 'truth', a word whose meaning she had already stated she did not know, these questions were without substance, and her acquiescent responses thereto were meaningless. The failure of these attempts at instruction are further shown by Barbara's specific and definite answers to the next two and final questions. She stated definitely that she did *not* know what would "happen to somebody who tells a story after they are sworn to tell the truth," nor what would "happen to somebody that swore to tell the truth and didn't." A more clear statement of a lack of "sufficient intelligence to have a just appreciation of the difference between right and wrong, and a proper consciousness of false swearing" would be difficult to find; a statement so clear as to nullify any idea that the Trial Judge was in "a better position than any appellate tribunal," to use the language of the Court of Appeals, "to consider and weigh all of the impalpable factors which should be taken into account, such as the attitude and demeanor of the witness, the extent of her intelligence and the degree of moral responsibility of which she might be capable."

This final colloquy between the witness and the Judge, on the basis of which she was sworn, is so startling as to warrant restatement:

Q. What do you think happens to anybody who tells a story after they are sworn to tell the truth?

A. I don't know.

Q. A lot of people don't know either, but what do you think? What would you think would happen to somebody that swore to tell the truth and didn't?

A. I don't know.

THE COURT: Go ahead and administer the oath. We just have to do the best we can. I think the jury heard her. They are the judges.

The Trial Judge's remark, quoted above, that "a lot of people don't know either" was wholly unjudicial. It actually encouraged the witness to maintain her lack of a proper consciousness of false swearing and indicated that he accepted his responsibilities lightly and casually. His final statement is incredible.

While the Trial Judge thus permitted Barbara to be sworn at this stage of the proceedings, it is noteworthy that he (1) expressed his own strong personal doubts as to her competency; (2) indicated that he thought he was under some compulsion to assist the District Attorney by permitting Barbara to testify whether she was competent or not (his statement, "We just have to do the best we can" is open to no other interpretation—he certainly wasn't doing "the best we can" for the Defendant); and (3) did not pass on the question of her competency but, *before* she was sworn, passed that question to the jury, then saying that, "the jury heard her" and that they were "the judges" of her qualifications as a witness.

2. Proceedings and Remarks After Barbara Was Sworn

Now, direct questioning having elicited clear and unfavorable responses, and the witness having actually been sworn, the Trial Judge apparently sought to allay his strong personal doubts by the following questions, which were so leading as to be wholly without probative value:

"DIRECT EXAMINATION

THE COURT: You are going to tell us the truth, you are not going to tell us anything that is not the truth?"

THE WITNESS: No, sir.

[It is impossible to ascertain whether this answer was in response to the first or to the second clause of the question.]

"THE COURT: You will be punished, you think, if you do.

THE WITNESS: Yes, sir."

He then made the even more extraordinary, final comment,

> "All right. I guess I did a little leading there but I don't know what else to do."

The significance of his final comment is that it shows that he realized that the acquiescent responses of a child to his leading and double-barreled questions, in the face of the previous questions and answers, were worthless; and that his personal doubts as to Barbara's qualifications were simply never resolved.

These were the proceedings in which the Court of Appeals could find no error.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals Erred:

1. In holding that the "testimony" of Barbara constituted legally sufficient evidence to support the conviction.
2. In holding that Barbara was a competent witness.
3. In holding that the Trial Judge did not abdicate to the jury his common-law function of determining the competency of Barbara as a witness.
4. In affirming the conviction.

REASONS RELIED ON FOR GRANTING THE WRIT

1. The decision below is in conflict with Rule 26 of the Federal Rules of Criminal Procedure in that it wholly fails to meet the standards of *Wheeler* v. *United States* (1895)

159 U.S. 523, the leading case on the question of competency of children as witnesses. There, Mr. Justice Brewer, speaking for a unanimous court, said:

> "The remaining objection is to the action of the court in permitting the son of the deceased to testify. The homicide took place on June 12, 1894, and this boy was five years old on the 5th of July following. The case was tried on December 21, at which time he was nearly five and a half years of age. The boy, in reply to questions put to him on his voir dire, said, among other things, that he knew the difference between the truth and a lie; that if he told a lie, the bad man would get him, and that he was going to tell the truth. When further asked what they would do with him in court if he told a lie, he replied that they would put him in jail. He also said that his mother had told him that morning to "tell no lie," and, in response to a question as to what the clerk said to him when he held up his hand, he answered, "Don't you tell no story." Other questions were asked as to his residence, his relationship to the deceased, and as to whether he had ever been to school, to which latter inquiry he responded in the negative. As the testimony is not all preserved in the record, we have before us no inquiry as to the sufficiency of the testimony to uphold the verdict, and are limited to the question of the competency of this witness.
>
> That the boy was not by reason of his youth, as a matter of law, absolutely disqualified as a witness is clear. While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former.
>
> • • • • • • • • • •
>
> These principles and authorities are decisive in this case. So far as can be judged from the not very extended examination which is found in the record, the boy was intelligent, understood the difference between truth and falsehood, and the consequences of telling

the latter, and also what was required by the oath which he had taken. At any rate, the contrary does not appear."

The voir dire of Barbara in the instant case shows (1) her clear lack of "appreciation of the difference between truth and falsehood;" (2) her lack of understanding of "the consequences of telling the latter;" and (3) her discouraging lack of intelligence. Hence, the conviction below cannot stand if judged by the *Wheeler* case.

2. The Court below has decided a Federal question of law in conflict with Rule 26 of the Federal Rules of Criminal Procedure and with the common law of the District of Columbia and elsewhere, and has so radically departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

A. The Trial Judge flatly abdicated his common law function of determining the competency of Barbara as a witness. Instead of determining her competency, as required by the common law generally and that of the District of Columbia, *Beausoleil* v. *United States,* (1939) 107 F(2d) 292, 71 App D.C. 111; *Commonwealth* v. *Regan,* 56 N.E. 577 (Sup. Ct. Pa.); *Ball* v. *State* (1949) 188 Tenn. 255, 219 S.W. (2d) 166; the Trial Judge unlawfully passed that question to the jury. Thus he stated *before* the witness was sworn, "I think the jury heard her. They are the judges." *supra,* p. 4. The statement in the opinion of the Court below that these remarks, made before the witness was sworn, "referred not to the competency of the witness but to the weight to be given to her testimony," is utterly unsupportable on the record.

B. The decision of the Trial Judge upheld by the Court below is in strong contrast to the more orderly action of the Trial Judge in the leading case of *Commonwealth* v. *Tatisos,* (1921) 238 Mass. 322, 130 N.E. 495, also a sex offense case.

There, unlike our case, even though the child indicated to the Court some understanding of the truth and the punishment for false testimony, the Trial Judge, being in doubt nevertheless, sent her to a priest for instruction, adjourning the trial meanwhile. That is the very least that the Trial Judge in the instant case could have done. Instead he helplessly stated "I don't know what else to do."

C. The Trial Judge permitted Barbara to testify on the theory that, "We just have to do the best we can." *supra*, p. 4. By "we" the Trial Judge certainly did not refer to the Defendant, who had objected to testimony from Barbara. *supra*, p. 4. He thus necessarily identified himself with the prosecution, and threw his weight against the Defendant, thereby denying to the Defendant that fair trial which due process guarantees to him.

D. The conduct of the Trial Judge represents a clear departure from the traditions of fair play, of orderliness rather than disorderliness, and of precision in reasoning, which are of the essence of judicial administration of the criminal law in this Country.

3. The decision below has decided an important question of Federal law which has not been, but should be, settled by this Court. The opinion of the Court of Appeals not only: (a) wholly incorrectly describes the examination of Barbara; (b) attributes a significance to the opportunity for observation of the witness by the Trial Judge, which the record nullifies; (c) misconstrues the Trial Judge's abdication to the jury of his responsibility to determine competency; but also, (d) fails to make allowance for the fact that this was a sex-offense case where female witnesses are notoriously unreliable.

Indeed the Court below actually approved standards of competency for a female child witness in a sex-offense case which were lower than those in other cases. That was error of the most serious and prejudicial character. The Court below should have insisted upon higher, not lower, stand-

ards of competency, for it has become increasingly recognized that the testimony of such a witness is likely to be unreliable. Dean Wigmore, in discussing the unreliable imaginings and false accusations of female children of 7, 9 and 13 years of age says (3 *Wigmore on Evidence,* sec. 924a):

> "No judge should ever let a sex-offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified phyiscian.
>
> "It is time that the Courts awakened to the sinister possibilities of injustice that lurk in believing such a witness without careful psychiatric scrutiny."

If that had been done here, this case would never have gone to trial.

An American Bar Association Committee's Report, quoted by Wigmore (p. 466) states:

> "Thus the erotic imagination of an abnormal child of attractive appearance may send an innocent man to the penitentiary."

This realization has been spreading in recent years in the light of growing medical knowledge, and hence what a trial judge should do to assure that female children in sex-offense cases are in truth and reality competent witnesses should be settled by this Court in order to stabilize the administration of criminal law in the District of Columbia and the Federal Courts generally. Otherwise, more innocent men of good reputation may be convicted on the erotic imaginings of female children who are wholly incompetent witnesses, of which this case is a striking and clear example.

Respectfully submitted,

ROBERT SHERIFFS MOSS,

F. TROWBRIDGE VOM BAUR,
Counsel for Petitioner.

July 31, 1953

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 227

ALVIN R. DORAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 3-5) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 4, 1953 (R. 6). On July 3, 1953, by order of the Chief Justice, petitioner's time for filing a petition for a writ of certiorari was extended to August 1, 1953 (R. 8). The petition was filed on July 31, 1953. The jurisdiction of this Court is

invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether the trial court properly determined that a 10-year-old girl was a competent witness to testify as to an indecent act committed by petitioner against her minor girl friend.

STATEMENT

Petitioner was convicted by a jury of committing an indecent act on a minor female, age 8, in violation of 22 D.C. Code (1951 ed.) 3501(a), 62 Stat. 347 (R. 3-4). He was sentenced to imprisonment for from one to four years, but the sentence was suspended and he was placed on probation. On appeal, the judgment of conviction was unanimously affirmed (R. 6).

The complaining witness was corroborated by her girl friend, Barbara Keenan. On Barbara's *voir dire,* after she had answered the trial court's inquiries to the effect that she was ten years old, that she went to church, and knew about God, the following occurred (R. 1-2):

> Q. Do you know what it means to swear to tell the truth?
>
> A. I don't.
>
> Q. You don't?
>
> A. No.
>
> Q. You know what it means to tell the truth, don't you?
>
> A. I don't.
>
> Q. You don't know that?

A. No, sir.

Q. Do you know what it is to tell a story, something that is not the truth?

A. Yes.

Q. If you swear to tell the truth, then you mustn't tell a story. You understand that?

A. Yes, sir.

Q. What do you think happens to anybody that tells a story after they are sworn to tell the truth?

A. I don't know.

Q. A lot of people don't know, either, but what do you think? What would you think would happen to somebody that swore to tell the truth and didn't?

A. I don't know.

The COURT: Go ahead and administer the oath. We just have to do the best we can. I think the jury heard her. They are the judges.

Mr. MCMENAMIN [petitioner's counsel]: I would like to interpose an objection for the record, if I may.

The COURT: All right.

Then, after the witness was sworn, the following occurred (R. 2):

DIRECT EXAMINATION.

By the COURT:

Q. You are going to tell us the truth, you are not going to tell us anything that is not the truth?

A. No, sir.

Q. You will be punished, you think, if you do?

A. Yes, sir.

The COURT: All right. I think I did a little leading then, but I don't know what else to do.

ARGUMENT

There is no merit to petitioner's argument that the testimony of the 10-year-old Barbara Keenan was incompetent by reason of her alleged lack of knowledge as to the meaning of an oath, as to what constitutes the truth, and as to the consequences of not telling the truth.

Decision as to a witness' competency rests primarily with the trial judge, who may conduct "any examination which will tend to disclose [the witness'] capacity and intelligence as well as his understanding of the obligations of an oath." *Wheeler* v. *United States,* 159 U. S. 523, 524-525. The trial judge, unlike an appellate court confined to the stripped account in a printed record, is able to appraise directly the general demeanor, intelligence, and capacity of the witness, and his decision will not be disturbed in the absence of a showing that it was clearly erroneous and an abuse of his discretion. *Id.* at 524; *Williams* v. *United States,* 3 App. D. C. 335, 339. The trial judge is required, as only he is able, to base his decision upon the entire examination of the witness, and not upon isolated answers to abstract questions concerning the difference between right and wrong or the na-

ture of an oath. *Posey* v. *United States,* 41 A. 2d 300, 301, 302 (Mun. Ct. App. D. C.); *Williams* v. *United States, supra,* at 341.

Applying these rules to the instant case, we think it clear that the trial judge acted well within his judicial discretion in ruling that Barbara Keenan was a competent witness. She stated under preliminary questioning that she was ten years of age, went to Sunday school, and knew about God. She said that she knew what it was to tell a "story," and understood that if she swore to tell the truth she must not tell a "story." Then, after she was sworn but before the trial judge permitted her to give any testimony on the merits, she responded clearly that she was going to tell the truth, and that she thought she would be punished if she did not. True, these last two statements were responses to leading questions by the trial judge; but he had the power to conduct "any examination" regarding the witness' capacity and intelligence and her understanding of the obligations of an oath, *Wheeler* v. *United States, supra,* at 525, and if he thought that leading questions were necessary in order to be completely satisfied as to the witness' competency, it was proper to resort to them. When the examination of the witness is considered in its entirety, as it must be, it is submitted that it discloses her competency, despite her isolated answers that she did not know the meaning of swearing, telling the truth, and what would happen to a person who swore to tell the truth but did not. Cf. *Posey* v.

United States, supra, 41 A. 2d at 301, 302; *Williams* v. *United States, supra,* 3 App. D. C. at 341.[1]

There is no substance in petitioner's insistence that the trial judge abdicated his function of determining the competency of Barbara as a witness, and transferred it to the jury (Pet. 9). The judge's statement—"Go ahead and administer the oath. We just have to do the best we can."— was tantamount at least to a preliminary ruling that the witness was competent. Then, after the witness was sworn and the judge asked the two leading questions which she answered to his satisfaction, this amounted to a final determination by the judge that the witness was competent to testify on the merits. The judge's remarks—"I think the jury heard her. They are the judges."—were, as the court below held (R. 5), merely a recognition that the jury does in effect pass upon the intelligence and moral responsibility of a witness in estimating his credibility, just as the trial judge does in deciding his competency. Cf. *Williams* v. *United States, supra,* 3 App. D. C. at 339.[2]

---

[1] See also the following state court decisions upholding the competency of minor witnesses in sex offense cases: *Needham* v. *State,* 215 Ark. 935, 940; *People* v. *Crowe,* 390 Ill. 294, 300-302; *State* v. *Ragona,* 232 Iowa 700, 701; *Rocha* v. *State,* 148 Tex. Cr. 237, 239-240.

[2] Petitioner intimates that the trial judge should have adjourned the trial to permit the witness to be instructed by a priest, or that she should have been given a psychiatric examination (Pet. 10, 11). These are mere afterthoughts, and were not raised by petitioner's counsel at the trial. It was not necessary to resort to these extraordinary measures in view of the total setting of the preliminary questioning clearly disclosing the witness' competency.

CONCLUSION

The case was decided upon established legal principles, and no question is involved of sufficient importance to merit further review by this Court. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
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Assistant Attorney General.
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ROBERT G. MAYSACK,
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SEPTEMBER, 1953.

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